Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling: Lawfulness	)	CC Docket No. 01-92
of Incumbent Local Exchange Carrier	)	
Wireless Termination Tariffs	)	
	)	

INITIAL COMMENTS OF MINNESOTA INDEPENDENT COALITION

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October 18, 2002

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SUMMARY

State tariffs provide an efficient alternative mechanism to establish compensation arrangements for CMRS traffic terminated to LECs through indirect (Type 2) interconnections. State tariffs do not prevent CMRS providers from demanding interconnection agreements under Sections 251 and 252 and do not control or supersede the terms and conditions of interconnection agreements. However, because of the costs of separate negotiations with multiple CMRS providers and the fact that LECs may not even know the identity of all CMRS providers that are terminating traffic to their networks, many CMRS interconnection arrangements with small LECs have been *de facto* bill and keep arrangements.

State tariffs are subject to the jurisdiction of State commissions, which also have jurisdiction over interconnection agreements under Sections 251 and 252. Consequently, there is no greater administrative burden on CMRS providers as a result of the use of State tariffs than would occur in connection with interconnection agreements. To the contrary, State tariffs may be more efficient because a single State tariff may take the place of multiple interconnection agreements.

Accordingly, the Commission should not categorically dismiss the use of State tariff filings and should dismiss the petition. Further, the Commission should not impair its previous decision that obligations between carriers may be based on State law.

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The following Initial Comments are submitted by the Minnesota Independent Coalition ("MIC"). The members of the MIC are approximately 80 rural telephone companies[1] providing local exchange service in Minnesota.

1. Background Facts.

Traffic volumes between most commercial mobile radio service ("CMRS") providers and most incumbent local exchange carriers and competitive local exchange carriers (collectively referred to as "LECs") are typically low. As a result, interconnection between LECs and CMRS providers most often occurs indirectly, through the Regional Bell Operating Company ("RBOC") LATA tandem switch. Through this Type 2A interconnection, the CMRS provider obtains indirect interconnection with all other networks connected to that LATA switch. One consequence of this manner of interconnection is that, unless and until the RBOC provides the LEC with call recording information to identify the carrier originating calls which are delivered to the LEC through the LATA tandem switch, CMRS traffic is delivered to the LEC network without identification of the originating CMRS provider. Further, with indirect Type 2 interconnection, CMRS providers do not need to obtain the consent or agreement of LECs to

[1] 47 U.S.C. § 153(37).

achieve physical interconnection with the LEC networks and have little or no incentive to approach LECs. As a result, small LECs may not even know the identity of all CMRS providers terminating traffic to their networks, much less be in a position to incur the costs of negotiating separate interconnection agreements with all CMRS providers, some of which may be large national providers.[2] The combination of these factors has resulted in a prevalence of *de facto* bill and keep arrangements between LECs and many CMRS providers.

2. CMRS Providers Always Have a Right to Negotiation or Arbitration of an Interconnection Agreement.

Under 47 USC §§ 251 and 252, CMRS providers always have a right to require the negotiation and, if necessary, the arbitration of an interconnection agreement with any incumbent LEC. Further, every LEC, incumbent and competitive, has the obligation to establish reciprocal compensation arrangements.[3] No tariff filing by a LEC can supersede these obligations, nor does any such filing evidence "bad faith" on the part of the LEC which "usurps [the Section 252 negotiation] process and removes the little bargaining power the CMRS carriers possess."[4] To the contrary, as discussed above, national CMRS providers have superior bargaining power and no incentive to bargain as long as they are allowed to terminate their traffic to LEC networks without charge.

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[2] In footnote 1 of the Petition, the Petitioners identify themselves as "the sixth largest national wireless provider in the U.S. with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers" (T-Mobile); "the leading provider of cellular service to rural areas in the western United States", owning "cellular licenses covering about 30% of the land in the continental United States" (Western Wireless); and "a nationwide CMRS carrier" (Nextel).

[3] 47 U.S.C. § 251(b) imposes on all LECs, incumbent and competitive, the obligation to establish reciprocal compensation arrangements, reading in part:

> Each local exchange carrier has the following duties:
>
> …
>
> (5) The duty to establish reciprocal compensation arrangements for the transport and termination of traffic.

The Petitioners' reliance on the 1987 Declaratory Ruling[5] and 1989 Memorandum Opinion and Order on Reconsideration[6] is misplaced. Those rulings predate Sections 251 and 252 and Congress' express grant of authority to States in connection with interconnection issues. A LEC tariff does not prevent a CMRS provider from invoking its rights under Sections 251 and 252, and the State commissions which oversee LEC tariffs dealing with interconnection will also resolve interconnection issues arising from negotiations for individual agreements.

Further, the Commission recognized that a determination of bad faith must be based on specific facts and cannot be made categorically, saying:

> (T)he instant proceeding is not the appropriate forum in which to determine whether a particular tariff filing constitutes bad faith in negotiating. Rather, we will review specific factual disputes on a case-by-case basis.[7]

The State commissions are in the best possible position to make such case-by-case determinations, and the Commission should not prevent such determinations.

3. State Tariffs May Provide an Efficient Mechanism for the Recovery of Costs.

In the context in which CMRS providers can obtain indirect interconnection without consent or notice to the LECs and CMRS providers have no incentive to approach LECs for an individual interconnection agreement, State tariffs provide an efficient mechanism for compensation *until* an individual interconnection agreement is established. The Petitioners say that LEC State wireless tariffs pose a "fundamental problem" of "unfair and unlawful terms and conditions," citing three States in which small or rural LECs have made wireless termination

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[4] Petition, page 10.

[5] *Second Radio Common Carrier Order*, 2 FCC Rcd 2910 (1987).

[6] *Third Radio Common Carrier Order*, 4 FCC Rcd 2369 (1989).

[7] Id. at ¶ 15.

tariff filings.[8] However, the facts show that CMRS providers have remedies available to address any problems without the need for a categorical and overbroad determination by the Commission. In each of those States, the State commissions have addressed or are in the process of addressing the validity and reasonableness of the ILEC filings.

Allowing individual States to address any concerns with State CMRS interconnection tariffs is appropriate and consistent with the role of States in regards to interconnection agreements. States determine unresolved issues in interconnection negotiations, and in particular, "(t)he states' role under section 252(c) is to establish specific rates when the parties cannot agree, consistent with the regulations prescribed by the Commission under sections 251(d)(1) and 252(d)."[9] CMRS providers are not subject to any further administrative burdens as a result of State CMRS interconnection tariffs than would result from establishment of individual interconnection agreements. In fact, individual agreements would be likely to require more administrative activity since tariffs may provide appropriate terms and conditions for all CMRS interconnections with an individual LEC.

Petitioners do not appear to claim that State commissions are incapable of assessing the reasonableness or validity of LECs' wireless termination tariffs, and Petitioners cite with approval the decisions of the Iowa and Oklahoma commissions to impose bill and keep for the exchange of traffic between LECs and CMRS providers. However, it should be noted that those decisions were based on rebuttable presumptions that the traffic between the carriers is balanced. The Iowa Utilities Board relied on the presumption as dictated by 199 IAC 38.6, which "specif(ies) the use of bill and keep for the exchange of local traffic, at least until such time as a

[8] Petition at pages 5-6.

[9] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, ¶ 11.

continuing and significant traffic imbalance has been shown."[10] The Oklahoma Corporation Commission agreed with the arbitrator's recommendation that "transport and termination be provided on a bill and keep basis until an individual traffic study establishes it is economically and justifiably appropriate to do otherwise."[11] It also clarified that "although the [Oklahoma] Commission finds that there is a presumption of 'balanced traffic,' nothing in this Order precludes a [Rural Independent Local Exchange Company] from filing an application to rebut that presumption by arguing that an imbalance of traffic is occurring and that the [Rural Independent Local Exchange Company] is losing revenue."[12] These decisions demonstrate that State commissions have the ability and are in the best position to address issues regarding interconnection, whether those issues arise in the context of tariffs or individual interconnection agreements. The Commission should refrain from taking action that would interfere with the appropriate exercise of these functions, which are the responsibility of the State under Sections 251 and 252.

It should also be noted that two of three Petitioners recognize that tariffs are an appropriate mechanism for arranging compensation between carriers. Those Petitioners are currently supporting their own rights to file tariffs in a separate proceeding before the Commission in order to avoid "expensive, time-consuming and circuitous litigation."[13] In that

[10] Iowa Utilities Board, *Order Affirming Proposed Decision and Order,* Docket No. SPU-00-7, TF-00-275 (DRU-00-2) (March 18, 2002), at page 10.

[11] Corporation Commission of the State of Oklahoma, Arbitration Proceeding, Cause No. PUD 200200149, 200200150, 200200151 and 200200153, *Interlocutory Order*, Order No. 466613, August 9, 2002, at pages 4-5.

[12] Id. at page 9.

[13] Joint Comments of Western Wireless Corporation and Voicestream Wireless Corporation [now T-Mobile], *In the Matter of the Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling on Issues Contained in the Access Charge Litigation Sprint PCS v. AT&T*, WT No. 01-316, at page 5 (December 12, 2001).

case, the Petitioners contend that the use of benchmarked rates would ensure reasonableness of terms while "requir[ing] relatively modest regulatory resources to implement and maintain." [14]

The same considerations support the use of LEC tariffs to address compensation arrangements with CMRS providers, subject to the right of the CMRS providers to request interconnection agreements. There is no efficient method for a small LEC to obtain compensation for terminating the traffic of a national CMRS provider. The CMRS provider enjoys the benefit of a *de facto* bill and keep system with the assurance that few rural LECs have the resources to pursue recovery for the imbalanced traffic. Wireless termination tariffs, subject to State commission review and analysis, may present a reasonable alternative to "expensive, time-consuming and circuitous litigation."

Finally, the FCC should take care not to overstate any decision it may make in this proceeding to abrogate its previous recognition that a carrier may have a payment obligation to another carrier providing it services, pursuant to an implied contract recognized under state law.[15] In that decision, the FCC stated "(t)here are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract."[16] If the FCC should determine, in the context of this proceeding, that the second of those choices, tariff, is not an appropriate mechanism, it should not preclude payment obligations which arise under either of the other methods.

[14] Id. at page 8.

[15] *In the Matter of the Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT No. 01-316 (July 3, 2002).

[16] Id. at ¶ 8.

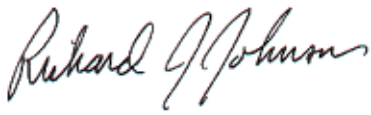
4. Conclusion.

For the reasons set forth above, the Commission should not preclude the use of State tariffs to establish interconnection arrangements between LECs and CMRS providers. CMRS providers retain the right to request interconnection agreements, and tariffs do not impose any administrative obligations on CMRS providers that are not also presented by individual interconnection agreements. State commissions have the authority and are in the best position resolve disputes regarding terms and conditions whether those disputes arise from tariffs or individual interconnection agreements. Accordingly, the Commission should dismiss the petition.

Dated: October 18, 2002.

Respectfully submitted,

MOSS & BARNETT
A Professional Association



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CERTIFICATE OF SERVICE

I, Kim R. Manney, do hereby certify that, on this 18th day of October, 2002, I have caused the foregoing "Initial Comments of Minnesota Independent Coalition" in CC Docket No. 01-92 to be filed electronically with the FCC by using its Electronic Comment Filing System, and copies of the Initial Comments were served by first-class U.S. mail, postage prepaid, on the following parties:

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